BEST AVAILABLE COPY

No. 92-231

Supreme Court, U.S.
F I L E D
OCT 2 1992
CLERK

In The

Supreme Court of the United States

October Term, 1992

COMMUNITIES, INC.; DULWORTH & RIVES, INC.,

Petitioners,

v.

JAMES B. BUSEY, Administrator, Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION,

Respondents.

and

COMMUNITIES, INC.,

Petitioner,

v.

SAMUEL K. SKINNER, Secretary of the United States, Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents,

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION OF RESPONDENT THE REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY

ROBERT W. GRIFFITH
T. KENNEDY HELM III
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400

MICHAEL M. CONWAY*
MICHAEL SCHNEIDERMAN
HOPKINS & SUTTER
Three First National Plaza
Suite 3700
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Intervenor-Respondent The Regional Airport Authority of Louisville and Jefferson County, Kentucky

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE WRIT 1

No Reason Exists Pursuant to Rule 10 To Grant A Petition for Writ of Certiorari 2

Growing Cargo Operations Justify the Project 3

The Land Acquisition Program Is Independent of the Airport Project and Is Nearly Complete..... 6

The Alternatives Petitioners Prefer Are Not Feasible or Prudent..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Communities , Inc., et al. v. *Busey, et al.*, 956 F.2d 619 (6th Cir. 1992) 3, 4, 6, 7, 9

Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851 (1989) 5, 6, 9

North Buckhead Civic Ass'n v. *Skinner*, 903 F.2d 1533 (11th Cir. 1990) 5

Piedmont Heights Civic Club v. *Moreland*, 637 F.2d 430 (5th Cir. 1981) 5

Suburban O'Hare Comm'n v. *Dole*, 787 F.2d 186 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986) 5

STATUTES

National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1983) 2

Department of Transportation Act, 49 U.S.C. 303 (1987) 2

Airport and Airway Improvement Act, 49 U.S.C. App. 2203 (1990) 4

REASONS FOR DENYING THE WRIT

Petitioners invite this Court to substitute their own view of the facts and their own judgments for those of the Federal Aviation Administration ("FAA"). The Petition is an extended quibble over facts, and judgments about facts, which are within the technical expertise of the FAA. It has little to say about errors of law by the FAA or the Court of Appeals.

Intervenor-Respondent Regional Airport Authority of Louisville and Jefferson County, Kentucky ("RAA") owns and operates the airport which is the subject of this case. To avoid duplication with the Brief in Opposition to be filed by the Solicitor General on behalf of the FAA and other federal respondents, the RAA limits this Brief to three points within its special knowledge:

(1) Petitioners' major premise – that cargo operations are not growing at the airport – is wrong. As the Court of Appeals stated, cargo operations are growing. Current information confirms that they still are growing.

(2) The land acquisition program which Petitioners claim should have been analyzed as part of the airport project has always had utility independent of the airport project, was started and will be completed with or without the airport project, was 69% complete when the Court of Appeals heard this case, and is approximately 80% complete today. Its environmental impacts are fully disclosed in the Final Environmental Impact Statement ("FEIS").

(3) The alternatives preferred by Petitioners were rejected for sound reasons of airport design and operation fully set forth in the administrative record. The alternative most enthusiastically endorsed by Petitioners as a feasible and prudent alternative for NEPA[1] and § 4(f)[2] purposes (Alternative 4) cannot be built. It would close the only sanitary landfill serving Louisville and its surrounding counties. Petitioners have never said where the garbage is supposed to go.

The FAA looked closely at each of these questions, reviewing the facts and technical judgments of experts and relying on its own expertise in matters of airport capacity and design. The Court of Appeals reviewed the record and found that the FAA's expert determinations were not arbitrary and capricious.

A. No Reason Exists Pursuant to Rule 10 To Grant A Petition for Writ of Certiorari

Supreme Court Rule 10 identifies the "character of reasons" which may, in the Court's discretion, support the issuance of a writ of certiorari. None is remotely present here. Neither a conflict among the circuits, nor a failure by the Sixth Circuit Court of Appeals to follow this Court's precedents exists. The Court of Appeals, to the contrary, engaged in the requisite NEPA "hard look"

---

[1] National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370 (1983).

[2] Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303 (1987).

at the FAA's decision approving the Standiford Field redevelopment, 956 F.2d 619, 626 (A 28-29). Equally properly, the Court, in analyzing Petitioners' challenges to FAA fact-finding, deferred to the administrative agency's expertise in overseeing the national air transportation system.

Finally, no important – but unsettled – question of federal law is raised in the Court of Appeals' decision that would require review by this Court. Rather, the Court of Appeals followed settled standards, articulated by this Court, in reviewing under federal environmental statutes the informed decision of a federal agency.

At bottom, Petitioners' dispute is with the FAA's fact-finding decisions. Such a factual dispute, however, affords no basis for issuance of a writ of certiorari.

Having identified no substantial issue of law requiring this Court's review in any of the bases identified in Rule 10, the petition should be denied.

B. Growing Cargo Operations Justify the Project

The Petition argues that the project is not needed because cargo operations at Standiford Field are not growing. That major premise is wrong.

Standiford Field is the eighth busiest cargo airport in the world because it is the principal hub for United Parcel Service ("UPS"), one of the largest cargo airlines in the United States. UPS's overnight cargo service requires all-weather ability to have many aircraft land in a short period of time and have those same aircraft depart in a short period after packages are sorted. The FEIS notes

that "because there is very little flexibility in UPS operations, this airline needs to be assured that capacity limitations in bad weather will not constrain their operations." (FEIS, p. 2-11) The FAA found that the project is required to provide that capacity.

Improving this airport will provide a modern cargo hub airport and will preserve more than 6,000 Kentucky jobs, and promise many more. UPS is Louisville's second largest employer. This project is essential to the economic future of Louisville and northern Kentucky, as well as to the efficient movement of freight throughout the United States.

Petitioners tell this Court that cargo operations are not growing. The Court of Appeals, after reviewing the administrative record, disagreed:

> UPS's operations have caused a dramatic growth in both express and air cargo aircraft operations; in four years, express cargo volumes have increased almost fivefold.

Communities , Inc., et al. v. *Busey, et al.*, 956 F.2d 619, 621 (6th Cir. 1992) (A 7). Petitioners say air cargo operations peaked in 1985 at 36,260 and dropped to 31,400 in 1987. (Pet. 6-7) But the FEIS shows actual cargo operations for the 12 months ending September 30, 1988 to be 42,684. (FEIS, p. 5-4) The administrative record also shows that the FAA was well aware of the growth of the air cargo industry in the United States, and of UPS's key position in that industry. The FAA is required by law to keep track of such things. *See, e.g.*, § 504 of the Airport and Airway Improvement Act, 49 U.S.C. App. 2203 (1990).

The legal test is whether the FAA acted in a non-arbitrary manner in estimating future cargo operation levels. *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-76, 109 S. Ct. 1851, 1861 (1989). Forecasting is an imperfect science and a court will uphold agency forecasts that are not unreasonable. *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1544 (11th Cir. 1990); *Piedmont Heights Civic Club* v. *Moreland*, 637 F.2d 430, 442 (5th Cir. 1981). *See also Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 198-99 (7th Cir.) (discussing airport demand forecasts), *cert. denied*, 479 U.S. 847 (1986).

Not only were the FAA's estimates reasonable at the time they were made and supported amply in the record, but subsequent experience proves the FAA to have been correct. Cargo operations continue to grow at this airport, although at a rate slightly less than FAA forecast and despite the temporary effects of the national economic downturn. While not in this record, RAA advises that for the 12 months ending June 30, 1992, there were more than 46,368 cargo operations at Standiford Field. FAA's expert and informed finding, in this record, that cargo operations at this airport would continue to grow has been confirmed by daily reality at Standiford Field.

Much of the Petition rests on the premise that "the record of airline cargo operations, when subjected to the required 'hard look' does not support the FAA conclusion that the expansion is needed." (Pet. 6) That premise is contradicted by the facts in the FEIS and by actual experience at the airport. This Court is presented with the same sort of issue it faced in *Marsh*, where this Court said:

> The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. . . . [R]esolution of this dispute involves primarily issues of fact. Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies."

490 U.S. at 376-77, 109 S. Ct. at 1860-61 (footnote and citations omitted). This is a dispute about the FAA's determination of facts within its expertise – facts which have been confirmed by subsequent reality. The Court of Appeals' opinion holding that the FAA decision is not arbitrary conforms to the principle articulated in *Marsh*.

C. The Land Acquisition Program Is Independent of the Airport Project and Is Nearly Complete

Petitioners insist that the land acquisition program, which is displacing residents of three neighborhoods in the airport area, is part of the airport project. They think the FAA's NEPA analysis mistakenly considered these homes to be gone whether the project went forward or not. The court below disagreed, after reviewing an exhaustive analysis of this issue by the FAA and Petitioners. The argument is hollow today because the neighborhood associations, which represent the displaced homeowners and were once parties to this case, voluntarily withdrew before argument in the Court of Appeals. *Communities*, 956 F.2d at 622, n. 1. (A 11, n.1).

The land acquisition program was designed to eliminate residences which are heavily impacted by existing

airport noise. Some of these residences are located *between* two busy air carrier runways; others are at runway ends. These homes are in areas of severe airport impact.

Strictly local funds were raised to buy these residences. The Court of Appeals reviewed the exhaustive record on this question and said:

> With or without the expansion of SDF, the governments of Louisville and Jefferson County have been and remain committed to removing certain residential properties from the three neighborhoods near SDF that are currently heavily impacted by aircraft noise. They have demonstrated that commitment by moving ahead with a land acquisition program – using strictly local money – long before there was any assurance that the airport project would, or could, be built.

956 F.2d at 626. (A 31). The responsible local governments unconditionally told the Court of Appeals that the properties would be acquired by the target date set forth in the FEIS. (Brief Amicus Curiae of City of Louisville, Kentucky and Jefferson County, Kentucky filed in the Court of Appeals.) The Court of Appeals noted that 69% of the properties had already been acquired as of the date of the FAA's order. 956 F.2d at 621, 626 (A 8-9, 31).

Since this submission in the Court of Appeals, the percentage of residences acquired has grown to approximately 80%. Litigation opposing residential acquisitions has been settled. Local proceedings to determine values and other payments are in progress. There is no remaining litigation seeking to stop completion of the residential

acquisition program and, to the knowledge of RAA, none is threatened.

NEPA requires analysis of the real world. The FAA concluded, as did the Court of Appeals, that these residences would be acquired with or without the airport project. The record amply supports that conclusion. Nothing in NEPA required FAA to analyze a fantasy world in which those residences would not be acquired.

D. The Alternatives Petitioners Prefer Are Not Feasible or Prudent

Petitioners told the Court of Appeals that airport expansion is "generally meritorious." (Brief of Petitioners in the Court of Appeals, p. 44) They agree with the broad local consensus in Louisville that Standiford Field should be improved. But Petitioners want the proposed expansion to be redesigned so that the impacts of the project to which they object will be visited on someone other than themselves. They proffer their layman's view of airport design as a substitute for the FAA's expertise.

Petitioners concede that the alternative to the proposed project which they most prefer (Alternative 4) would require closing of the only sanitary landfill serving Louisville. They argue that "the closing of a landfill required for Alternative 4 is a reason to prefer, not to reject the alternative." (Pet. 26) Quite aside from the special engineering problems of building a safe runway on a landfill, that proposition is true only if there is an alternative landfill.

But Petitioners have never said where the replacement landfill should be, or even said that there *is* a suitable place for one. Petitioners are so completely focused on airport impacts which they perceive as bad for them, that they have overlooked the need for Louisville to put its garbage someplace. Without a plausible alternative site for a new landfill, use of the only existing landfill for a runway is not feasible or prudent.

The Petition devotes several pages to providing this Court with inexpert opinions on airport safety and efficiency. (Pet. 28-29) Petitioners offer curbstone arguments for alternatives to the project, lecturing the FAA and this Court on such matters as separation of cargo and passenger operations and operational flexibility. They also believe that UPS misunderstands its own self interest and has endorsed the wrong project.

These are the kinds of questions on which this Court has deferred to agency expertise. *Marsh, supra*. The FAA found that the alternatives which Petitioners prefer will not serve the transportation goals of the project and therefore are neither feasible nor prudent for NEPA or § 4(f) purposes. Neither would provide the needed runway capacity for cargo hub operations. Neither would be built because neither makes sense. That is why the FAA, after review of the extensive record, rejected them.

The Court of Appeals found that the "reasons for deeming the other alternatives infeasible were fully explained." 956 F.2d at 627 (A 34). Petitioners offer nothing but their layman's views of technical issues to challenge that conclusion.

CONCLUSION

Petitioners have their facts wrong on cargo operations: cargo activity is growing not declining at Standiford Field. Petitioners have their facts wrong on land acquisition: it already is – and will continue to be – a reality with or without the airport project. Petitioners have their facts wrong on alternatives: their preferred alternatives are neither feasible nor prudent.

Most important, these fact-intensive issues – initially resolved by the FAA and upheld by the Court of Appeals – provide no proper basis for seeking the extraordinary review of this Court.

RAA respectfully requests that the petition for issuance of a Writ of Certiorari be denied.

Dated: October 2, 1992

Respectfully submitted,

ROBERT W. GRIFFITH
T. KENNEDY HELM III
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400

MICHAEL M. CONWAY*
MICHAEL SCHNEIDERMAN
HOPKINS & SUTTER
Three First National Plaza
Suite 3700
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Intervenor-Respondent
The Regional Airport Authority of
Louisville and Jefferson County, Kentucky

*Counsel of Record